IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 809 OF 2004

Sou.Shilpa Arvind Hosing. ... Appellant.
Versus.
Smt.Diwaliben Kantilal Oswal
and others. ... Respondents.

Shri R.S.Apte with Shri N.R.Bubna for the Appellant.

Shri N.V.Bandiwadekar with Shri S.M.Kamble for the Respondent No.4.

CORAM : ABHAY S. OKA, J.

DATED : 10th February, 2005.

P.C.:

1. On 21st July 2004 notice for final disposal of the Appeal at admission stage was issued. Accordingly after the Respondents are served, the Appeal is taken up for final hearing. On 28th January 2004, I have indicated to both the Advocates that the question (B) in the Memorandum of Appeal is the substantial question of law on which the Appeal will be heard. I have heard the Advocates appearing for the parties.

2. The Appeal is by the original Defendant. The dispute pertains to a plot of land. The Appellant agreed to purchase the said plot from one Bajrang Balwant Jagdale for a value of Rs.1920/-. The said agreement was an oral agreement. The Appellant filed a suit for specific performance of the said Agreement.

The suit was decreed by the trial Court. The execution proceeding was filed by the Appellant for executing the decree. In the said execution proceedings, the Respondents were impleaded as parties. The Respondents filed a separate suit contending that on 5th March 1984 they purchased the suit plot for consideration of Rs.99/- and they were put in possession. A contention was raised that they were deliberately not impleaded as parties to the suit filed by the Appellant. The prayer in the said suit is for declaration that the decree for specific performance is obtained by illegal means and is not binding on them. In the said suit, interim relief was granted by which execution of the decree in favour of the Appellant was stayed. The trial Court decreed the suit and the Appeal preferred by the Appellant herein has been dismissed.

3. One of the contentions raised before the Courts below was that the Respondents/Plaintiffs are claiming independent right, title and interest in respect of the suit plot and therefore, their remedy is to get their rights adjudicated in the pending execution proceedings to which they are parties. A contention was raised that a separate Civil suit was not maintainable. The Appellate Court has noted that none of the parties have produced copies of the orders passed in the Execution proceedings. The Appellate Court proceeded on the footing that the execution proceeding is disposed of.

The Counsel appearing for the parties have fairly stated before me that Regular Darkhast No.364 of 1993 is pending and is not disposed of. The Appellate Court while dealing with the submissions made on the basis of section 47 of the Code of Civil Procedure, 1908, held thus:

> ".....As already pointed out Section 47 of the C.P.C. would apply only if important questions fall for adjudication arise between the parties to the suit or their representatives and not in between independent or third parties. Under Order 21 Rule 97 the person causing resistance or obstruction is not entitled under this rule to make an application. However, if the decree holder makes necessary application the person causing obstruction or resistance is entitled to defend his conduct. Rule 99 of Order 21 CPC would come into play only which the person in possession if he has lost possession or if he desires before surrendering possession he may file an application under rule 99 or he may file suit for declaration of his title to the property he being stranger to the decree who claims to be not bound by the decree and under Rule 101 it is quite apparent that

questions to be determined in proceedings under Rule 97 and 99 has to be decided by the executing court and not by separate suit and for this there has to be some application before the executing court under Rule 97 or 99. Thus considering the over all circumstances of the case and after giving thoughts to arguments advanced before me and so also after going through the rulings so preferred to and cited by the respective sides, I feel that suit of respondent was very much tenable and as such they were entitled to seek declaration asked for."

4. The learned Counsel appearing for the Appellant has relied upon the Judgment of the learned Single Judge of this Court reported in IV (2002) CLT page 477 (Smt.Sushila Sadanand Borkar & ors v/s. Smt.Maria Exaltacao & anr.) and submitted that since the Respondents are parties to the execution proceedings they have to get their right, title and interest adjudicated from the executing Court and a separate suit is not maintainable. He also relied upon a Judgment of the Apex Court to which reference will be made later on.

5. Shri Bandewadekar, the learned Counsel for the Respondent No.4 submitted that the Respondents purchased

the suit property prior to the institution of the suit and as value of the property was less than Rs.100/- there was no question of executing any registered document in view of section 54 of the Transfer of Property Act, 1882. He submitted that though the Appellant had full knowledge about the transaction entered into by the Respondent, she deliberately did not implead the Respondent as party Defendants to the suit for specific performance and has fraudulently obtained the decree and therefore, the Courts below were justified in granting declaration. Mr.Bandewadekar also relied upon the Judgment of the learned Single Judge of this Court reported in 2002(5) Bom.C.R. page 438 (Baun Foundation Trust & anr. v/s. Faredoon Rustom Tirandas & anr.) and submitted that the suit was maintainable.

6. It is necessary to refer to the Judgment of the Apex Court reported in (1997) 3 SCC page 694 (Brahmadeo Chaudhary v/s. Rishikesh Prasad Jaiswal). The Apex Court in paragraph 9 has held thus:

> "9. .....The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order 21 Rule 99. This view of the High Court on the aforesaid statutory scheme is

clearly unsustainable. it is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order 21 Rule 99, Order 21 Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order 21 Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest de hors the interest of the judgment-debtor. Both these types of inquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order 21 and it is not as if that such a

stranger to the decree can come in the picture only at the final stage after losing possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of Order 21 Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order 21 Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist, who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go

overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the Executing Court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. **On the contrary the statutory scheme envisaged by Order 21 Rule 97 C.P.C. as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the Executing Court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order 21 Rule 97 to 103 would remain a complete Code and the sole remedy for the parties concerned to have their grievances once and for all finally resolved in execution proceedings themselves."**

In so far as the judgment of the learned Single Judge of this Court in the case of Baun Foundation Trust (supra)

is concerned, it is true that the learned Single Judge has considered the Judgment of the Apex court in Brahmadev Chaudhary's case (supra). However, it is to be seen here that the learned Single Judge was considering the scope of Rule 99 of Order 21 of the Code. What has been held by the Apex Court is that even a person who is a stranger to the suit and who is claiming independent right, title and interest in the suit property raises an objection to the execution of the decree, the same will have to be adjudicated by the executing Court as contemplated by Rule 97 of Order 21. The Apex Court has also held that Rules 97 to 103 of Order 21 constitute a complete Code. The Apex Court also noted that the intention of the legislature is to avoid multiplicity of the proceedings.

7. In view of what is laid down by the Apex Court, the Respondents can always get their rights adjudicated in the pending execution proceedings. Admittedly the Respondents are parties to the execution proceedings filed by the Appellant. In my view the suit filed by the Respondents was not maintainable and was barred as a complete remedy was available under Order 21 of the Code to the Respondents.

8. Considering the view which I am taking, I am not entering in the merits of the title pleaded by the Respondents in the suit filed by them. It is also

necessary that some time is to be granted to the Respondents to move the Executing Court.

9. Hence the following order is passed:

(i) The impugned Judgments and Decrees are quashed and set aside and the suit filed by the Respondents is dismissed on the ground that it is not maintainable.

(ii) The Respondents will be at liberty to approach the Executing Court by making appropriate application. If such an application is made the Executing Court will consider the same on its own merits in accordance with the law laid down by the Apex Court and will pass appropriate order as contemplated by law.

(iii) The decree in favour of the Appellant will not be executed for a period of 12 weeks from today to enable the Respondents to take appropriate steps.

(iv) All contentions raised by the Respondents on merits in their suit are expressly kept open.

(v) The Appeal is partly allowed in the above terms with no order as to costs.

(vi) Parties to act on an authenticated copy of the order.

Judge.